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Case No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1992

MARK A. THOMAS, JOHN HAGAR, DOUGLAS GILLOTT, REYES MEDRANO, EDWARD WATKINS, ANTHONY SINTAS, ANTHONY GIRON, MICHAEL CHURCH, BUCKLEY BERKEY, WILLIAM CHURCHILL, and VICTOR BRADEE, ON THEIR BEHALF, and ON BEHALF OF ALL SIMILARLY SITUATED INDIVIDUALS WHO MAY ELECT TO PARTICIPATE IN THIS ACTION PURSUANT TO 29 U.S.C. SECTION 216(d),

Petitioners,

v.

THE WICHITA COCA-COLA BOTTLING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ANDREW T. BRAKE, P.C.
Andrew T. Brake
Counsel of Record for Petitioners
10200 E. Girard Ave., #B-233
Denver, Colorado 80231-7500
Telephone: (303) 368-7500

QUESTIONS PRESENTED FOR REVIEW

1. What constitutes practical continuity of movement of products in interstate commerce relative to the wholly intrastate delivery of products which originally were transported from another State for purposes of the Motor Carrier Act ("MCA") Exemption to the Fair Labor Standards Act ("FLSA")

2. Whether picking up, returning to and unloading empty containers at a local warehouse by drivers who do not travel outside of a State's boundaries and which are later shipped out of State constitutes interstate commerce for purposes of the MCA Exemption to the FLSA, as applied to the drivers who do not travel outside of a State's boundaries.

LIST OF ALL PARTIES

1. Mark A. Thomas
2. John Hagar
3. Douglas Gillott
4. Reyes Medrano
5. Edward Watkins
6. Anthony Sintas
7. Anthony Giron
8. Michael Church
9. Buckley Berkey
10. William Churchill
11. Victor Bradee
12. All Similarly Situated Individuals Who May Elect To Participate In This Action Pursuant To 29 U.S.C. SECTION 126(d),
13. The Wichita Coca-Cola Bottling Company. Petitioners are not aware of the existence of any parent companies and subsidiaries.

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OPINIONS OF THE COURTS

1. Opinion Of The United States Court Of Appeals For The Tenth Circuit - Filed July 1, 1992.

2. Order Of The United States District Court For The District Of Colorado - Filed July 9, 1991.

JURISDICTIONAL STATEMENT

i. The United States Court Of Appeals For The Tenth Circuit Filed Its Opinion Affirming the United States District Court's July 9, 1991 Order And Judgment Dismissing Petitioners' Complaint on July 1, 1992.

ii. No Re-Hearing Was Requested, Nor Was An Extension Of Time Within Which To File The Petition For A Writ Of Certiorari Sought.

iii. 28 U.S.C. 1254 Confers Jurisdiction On This Court To Review The Judgment Or Decree By Writ Of Certiorari

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STATEMENT OF THE CASE

A. JURISDICTIONAL STATEMENT

The jurisdiction of the United States District Court For The District Of Colorado was based upon the Petitioners' claims made under 28 U.S.C. Section 1343 and 29 U.S.C. Section 201 et seq.

The Petitioners filed an action pursuant to the Fair Labor Standards Act ("FLSA"), alleging that the Respondent Wichita Coca-Cola Bottling Company ("Respondent") failed to pay Petitioners overtime wages in violation of the FLSA.

The Respondent filed a Motion for Summary Judgment relative to Petitioners which was granted by the District Court on or about July 9, 1991. On or about September 13, 1991, Judge Sparr certified the July 9, 1991 dismissal as final pursuant to Rule 54(b), Fed.R.Civ.P.

The Petitioners timely appealed as of right from the order granting Respondent's Motion for Summary Judgment pursuant to Rule (4)(a)(1) of the Federal Rules of Appellate Procedure. A protective notice of appeal was timely filed on August 1, 1991, and a supplemental notice of appeal was timely filed on September 13, 1991. The United States Court Of Appeals For The Tenth Circuit affirmed the dismissal of Petitioners' claims in its opinion filed July 1, 1992.

B. STATEMENT OF MATERIAL FACTS

Respondent is a privately owned corporation headquartered in Wichita, Kansas and is engaged in the business of bottling and selling Coca-Cola products. Respondent has a separate Colorado Division with a facility located in Colorado Springs, Colorado. Petitioners were all employed by the Colorado Springs, Colorado division.

The Petitioners held various positions with Respondent including but not limited to Cold Drink Route Driver, Post-Mix Pre-Mix Route Driver, Home Market Route Driver, Cold Drink Supervisor, and Home Market Manager. The Respondent, in operating its facility in Colorado Springs, prepared and forwarded monthly forecasts, which outlined anticipated product requirements to be supplied, in part from a bottling plant in Wichita, Kansas to the home office in Wichita, Kansas, by the 20th of each month. The monthly forecast included the following information:

- Current Floor Inventory;
- Projected Sales for the Remainder of the Month;
- Previously Ordered Product - Not Yet Received;
- Sales Projections for the Following Month;

- Comparison of Historical Sales Records.

Products sold by the Colorado Springs, Colorado facility which were not supplied or produced in the Wichita, Kansas bottling facility were provided from other non-affiliated processors or other locations within the State of Colorado, including the Denver Coca-Cola bottling facility. Such products were commingled with the product supplied by the Wichita, Kansas facility. Regardless of the source of the product sold by the Colorado Springs, Colorado facility, all product orders were for purposes of maintaining inventory at the facility, and anticipating future customer orders. Under no circumstances were specific quantities of a given product shipped from the Wichita, Kansas Bottling facility to be moved through to a specific destination or customer beyond the Colorado Springs, Colorado facility of the Colorado division.

Upon receiving the orders for product from the Colorado Springs, Colorado facility, the plant in Wichita, Kansas filled the orders and transported the product to the Colorado Springs, Colorado facility, normally via a switching station in Lakin, Kansas, by tractor/trailer units. Products provided from other sources were delivered by the processor's transport or by common carrier.

Upon arrival in the Colorado Springs, Colorado facility, product was commingled and used to replenish inventory which had been previously sold or allocated to the customers of said facility. Employees of Respondent employed at the Colorado Springs, Colorado facility, including Petitioners, delivered the product to customers within the Colorado Springs, Colorado division area boundaries only. The division area only included locations within the State of Colorado, and delivery of the product within the division did not necessitate, require or result

in employees of the Colorado Springs, Colorado facility travelling outside of the State of Colorado.

Employees of the Colorado Springs, Colorado facility who delivered the product to customers included those holding the positions of Cold Drink Route Drivers, Post-Mix Pre-Mix Route Drivers, Home Market Route Drivers, Home Market Account Managers and Route Supervisors (hereinafter collectively referred to as "Workers").

Virtually all of the activities performed by the Workers consisted of transporting the product, product stock rotation, shelf stocking, setting up displays, loading or unloading trucks, and maintaining inventory levels for each store on a previously sold and/or allocated basis.

In addition, Petitioners performed the duty of picking up empty containers which they returned to Respondent's Colorado Springs, Colorado facility and unloaded. The empty

containers were shipped back to Respondent's Wichita Coca-Cola Bottling facility located in Wichita, Kansas on a daily basis.

LEGAL ARGUMENT

The FLSA (29 U.S.C. Section 201, et seq.) specifically provides:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any work week is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed;

29 U.S.C. Section 207(a)(1).

The above-referenced standard applies to all employees identified in 29 U.S.C. Section 207(a)(1), unless the employee is subject to one of the exemptions contained in the FLSA. The Respondent, in its Answer To Petitioners' First Amended Complaint, specifically admitted:

> 16. Defendant admits that Plaintiffs' employment at all times relevant is and/or was governed by the Fair Labor Standards Act, 29 U.S.C. Section 201, et seq. Except as hereinabove expressly admitted, Defendant denies, generally and specifically, each and all the allegations contained in Paragraph 16.

The Respondent maintained, and the United States District Court For The District Of Colorado found that the exemption contained in Section 13(b)(1) of the FLSA applied to and barred Petitioners' claims for overtime wages. Section 13(b)(1) of the FLSA provides, in pertinent part:

> (b) The provisions of Section 207 of this Title shall not apply with respect to -
> (1) Any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 3102 of Title 49; or....

29 U.S.C. Section 213(b)(1).

49 U.S.C. Section 3102 provides:

> (a) This section applies to transportation -
> (1) Described in Sections 10521 and 10522 of this Title; and

(2) To the extent that transportation is in the United States and is between places in a foreign country, or between a place in a foreign country and a place in another foreign country.

49 U.S.C. Section 3102.

49 U.S.C. Section 10521 provides:

(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation by motor carrier and the procurement of that transportation, except by a freight forwarder (other than a household goods freight forwarder), to the extent that passengers, property, or both, are transported by motor carrier -

(1) Between a place in -

(a) A state and a place in another state;

(b) A state and another place in the same state through another state;

(c) The United States and a place in a territory or possession of the United States to the extent the transportation is in the United States:

(d) The United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or

> (e) The United States and a place in a foreign country to the extent the transportation is in the United States; and . . . .

49 U.S.C. Section 10521.

On its face, it would appear that the only provision of the MCA which might be applicable is 49 U.S.C. Section 10521(a)(1)(A) as the Petitioners' activities were limited solely to the State of Colorado. However, as the Petitioners did not travel through another State in their transportation of Coca-Cola products, it would appear that said provision is inapplicable. As such, the MCA Exemption would normally be inapplicable.

In certain instances, another of the provisions outlined in 49 U.S.C. Section 10521 has been held to be applicable to the wholly intrastate transportation of goods, thereby entitling the Interstate Commerce Commission or the Secretary of Transportation to regulate said activities and providing an exemption to the FLSA. Specifically, this Court has determined

that goods in Interstate Commerce (i.e. transported from one State to another State) which have a solely intrastate leg, will remain in Interstate Commerce for purposes of the MCA Exemption of the FLSA as long as it is determined that there is a "practical continuity of movement of the goods until they reach the customers for whom they are intended." Walling v. Jacksonville Paper Co., 317 U.S. 564, 568, 63 S.Ct. 332, 335, 87 L.Ed. 460.

The purpose of the foregoing test is to determine the authority of the Secretary of Transportation to establish qualifications and maximum hours of services for employees engaged in transporting goods on the wholly intrastate leg of an interstate journey, as said determination is dispositive of the entitlement to the MCA Exemption to the FLSA issue. The purpose and intent of the MCA is to ensure the safety of operations of transporting goods in Interstate Commerce. Levinson v. Spector Motor

Service, 330 U.S. 649, 671, 67 S.Ct. 931, 91 L.Ed. 1158 (1947); Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695, 708 67 S.Ct. 954, 91 L.Ed. 1184 (1947); Baird v. Wagoner Transportation Company, 425 F.2d 407, 412-13 (6th Cir. 1970). Accordingly, any determinations made relative to the "practical continuity of movement" test outlined in Walling, supra, must be governed by the congressional intent behind the Act, as recognized in Levinson, supra, Ispass, supra, and Baird, supra.

In determining whether an employee's activities directly affect the safety of operations in Interstate Commerce, the focus is on the character of the activities engaged in by the employee rather than the proportion of either the employee's time or his total activities that determine the actual need for the ICC's or Secretary of Transportation's power to establish reasonable requirements with respect to qualifications, maximum hours of service, and

safety of operation of equipment. Morris v. McComb, 331 U.S. 422 (1947).

In the instant action, two questions relative to the character of the Petitioners' activities were raised:

(1) Whether the wholly intrastate delivery of Coca-Cola products from a local and wholly separate distribution point in Colorado Springs, Colorado, which was initially shipped from out-of-state to said distribution point remained in interstate commerce for purposes of the MCA Exemption to the FLSA, and

(2) Whether the Petitioners' activities in picking up empty containers within the State of Colorado which were returned and unloaded at the Respondent's Colorado Springs, Colorado distribution point and which were ultimately transported out-of-state by others constitutes interstate commerce for purposes of the MCA Exemption to the FLSA.

Two lines of authority have been developed in determining "practical continuity of movement" as referenced in Walling, supra. The United States Courts of Appeal in the various Circuits have split on this issue, resulting in a number of tests and factors in determining whether or not an employee is subject to the MCA Exemption to the FLSA. Further, the Code of Federal

Regulations has discussed this issue, which provisions have been ignored by several of the Courts.

Specifically, the Code of Federal Regulations, in discussing "Interstate Commerce" under the MCA and FLSA noted:

> . . . (2) The Interstate Commerce Commission held that transportation confined to points in a single state from a storage terminal of commodities which have had a prior movement by rail, pipeline, motor, or water from an origin in a different state is not in interstate or foreign commerce within Part II of the Interstate Commerce Act if the shipper has no fixed and persisting transportation intent beyond the terminal storage point at the time of shipment. See Ex Parte No. MC-48(71 M.C.C. 17, 29). The Commission specifically ruled that there is not fixed and persisting intent where: (i) at the time of shipment there is no specific order being filled for a specific quantity of a given product to be moved through to a specific destination beyond the terminal storage, and (ii) the terminal storage is a distribution point or local marketing facility from which specific amounts of the product are sold or allocated, and (iii) transportation in the furtherance of this distribution within the single state is specifically arranged only

> after sale or allocation from storage. In Baird v. Wagoner Transportation Co., 425 F.(2d) 407 (C.A. 6), the court found each of these factors to be present and held the intrastate transportation activities were not 'in interstate commerce' within the meaning of the Motor Carrier Act and denied the Section 13(b)(1) exemption. While ex parte No. MC-48 deals with petroleum and petroleum products, the decision indicates that the same reasoning applies to general commodities moving interstate into a warehouse for distribution (71 M.C.C. at 27). Accordingly, employees engaged in such transportation are not subject to the Motor Carrier Act and therefore not within the Section 13(b)(1) exemption. They may, however, be engaged in commerce within the meaning of the Fair Labor Standards Act. . . .

29 C.F.R. Ch. V (7-1-90 Ed.) Section 782.7, pp. 707, 708.

As indicated in the foregoing quote, Baird v. Wagoner Transportation Co., 425 F.2d 407 (6th Cir. 1970) identified a three part test in determining whether goods are within interstate commerce relative to a wholly intrastate leg. In Walling v. Comet Carriers, 151 F.2d 107 (2d. Cir.

1945), the Court Of Appeals For The Second Circuit addressed a situation in which employees of a trucking company who carried goods from manufacturers to be processed and took the finished goods back to manufacturers and performed all of their work wholly within the State of New York were not subject to regulation by the ICC as there was no "practical continuity of movement" as recognized in Walling v. Jacksonville Paper Co., supra.

Further, the United States Court Of Appeals For The Fifth Circuit determined that beef which was delivered from Iowa to the State of Florida where it was boned, trimmed and cut to order did not subject the drivers who transported the processed beef wholly within the State of Florida to the MCA Exemption of the FLSA as it was determined that movement of the beef in interstate commerce ceased upon reaching the Employer's storage and processing area. Kline v. Wirtz 373 F.2d 281 (5th Cir. 1967). The United

States Court Of Appeals For The Seventh Circuit has also addressed the issue. Specifically, the court held that drivers employed to drive routes solely within the State of Illinois who picked up and delivered meat scraps to rendering plants located in the State of Illinois where the meat scraps were processed, were not subject to the MCA Exemption of the FLSA, as said processing broke the continuity of transportation, thereby precluding a holding that there was a through interstate movement of the scraps. Accordingly, the Court held that the drivers were not engaged in operating motor vehicles in interstate commerce and they were not exempt from the overtime provisions of the Fair Labor Standards Act. Goldberg v. Faber Industries, Inc., 291 F.2d 232 (7th Cir. 1961).

The United States Court Of Appeals For The Ninth Circuit addressed a situation in which logs were transported from a location where they were loaded, to a sort yard all within the State of

Washington. While some of the logs went out of state, some of the logs remained in state, and the logging company could not designate which logs would eventually be exported. On these facts, the Court determined that the transportation of logs from various locations within the State of Washington to the Tacoma, Washington sort yard was wholly intrastate. Burlington Northern v. Weyerhaeuser Co., 719 F.2d 304 (9th Cir. 1983). Finally, the ICC, in R. L. Surles Contract Application, 4 M.C.C. 488 (1938), determined that a shipment from a warehouse in Texas to other points in Texas was intrastate in character, notwithstanding the fact that the goods had initially been shipped from out-of-state. The ICC specifically determined that the out-of-state shipper's intent to distribute merchandise at some point in the future did not establish the essential "continuity of movement" required to the make the intrastate leg of the transportation interstate in character.

By contrast, a line of decisions has developed concerning very similar circumstances to those outlined hereinabove which have held that the MCA exemption to the FLSA was applicable. Specifically, in Griffin v. Consolidated Foods Corp., 771 F.2d 826 (4th Cir. 1985), the United States Court Of Appeals For The Fourth Circuit held that an employee who delivered panty hose from a distribution point in North Carolina solely within the State of North Carolina was subject to the MCA Exemption of the FLSA. The Court determined that some of the routes from the North Carolina distribution point entailed crossing State lines, and that Griffin could have been assigned such a route which, by definition, would be interstate in nature.

Further, in Stewart - Jordan Distributing Co. v. Tobin, 210 F.2d 427 (5th Cir. 1954), the Fifth Circuit Court Of Appeals held that drivers of beer delivery trucks and their helpers who loaded empty cases and bottles on trucks which

were intended for interstate shipment and returned to breweries pursuant to an agreement by which breweries would buy back all the empty bottles returned, were "engaged in commerce" within the meaning of the Fair Labor Standards Act. The United States Court Of Appeals For The Fifth Circuit also held that the ICC could regulate a clearly intrastate leg of a shipment as the shipper had a storage in transit provision in its documentation which indicated that the fixed intent of the shipper was for a point beyond the intrastate leg, thereby constituting a continuous interstate movement. Central Freight Lines v. I.C.C., 899 F.2d 413 (5th Cir. 1990). In Opelika Royal Crown Bottling Company v. Goldberg, 299 F.2d 37 (5th Cir. 1962), the Court Of Appeals For The Fifth Circuit determined that soft drinks which were transported from out-of-state to a distribution center, warehoused, and subsequently distributed locally were not "in interstate commerce" since the soft

drinks were not ordered from the distribution center in accordance with pre-existing customer orders. However, the Court determined that where empty bottles were picked up and ultimately returned to the out-of-state distribution center pursuant to an agreement requiring same constituted interstate commerce, as empty bottles had to be returned before full bottles could be obtained, thereby subjecting the employees to the MCA Exemption of the FLSA. The Court Of Appeals For The Fifth Circuit has also held that the ICC had jurisdiction to issue a declaratory judgment which held that carpet bound from Georgia for Texas destinations moved in interstate commerce during its warehouse-to-destination trips solely within Texas borders. The Court identified various factors in addition to those outlined in Baird, supra, including a storage-in-transit provision, and accordingly, the fixed and persisting intent was for the goods to remain in interstate commerce. State of Texas v. United

States, 866 F.2d 1546 (5th Cir. 1989). Finally, in Galbreath v. Gulf Oil Corp., 413 F.2d 941 (5th Cir. 1969), the Court Of Appeals For the Fifth Circuit applied the three factor test outlined in Baird, supra, and determined that the wholly intrastate transport of petroleum products, by truck drivers who delivered said products, was subject to the MCA Exemption of the FLSA, as it was determined that the storage of petroleum products did not interrupt the "continuity of movement" in interstate commerce. Said determination would appear to be contrary to the Baird, supra, decision.

The United States Court Of Appeals For The Eighth Circuit addressed two situations, one involving the intrastate transportation of soy beans which also had an interstate leg and the intrastate transportation of Urea fertilizer which had an interstate component. In one instance, the Court held that the shipment of the fertilizer was subject to the MCA Exemption of

the FLSA, and with regard to the soy beans, held that the MCA Exemption of the FLSA did not apply. Roberts v. Levine, 921 F.2d 804 (8th Cir. 1990). In International Broth. of Teamsters v. ICC, 921 F.2d 904 (9th Cir. 1990), The Court Of Appeals For The Ninth Circuit addressed the characterization of transportation between two points within the same state as a continuation of an interstate shipment where the shipper had a fixed and persisting intent at the time of shipment resulting in the goods remaining in interstate commerce. Said determination was based upon a storage-in-transit provision relative to the shipment of the goods. Finally, in Baez v. Wells Fargo Armored Service Corp., 938 F.2d 180 (11th Cir. 1991), The Court Of Appeals For the Eleventh Circuit held that driver guards, messenger guards and guards for security armored truck pick-up and delivery service were exempt

from the FLSA as the guards' employer was a "contract carrier" subject to jurisdiction of the Secretary of Transportation under the MCA. Specifically, the Court held that the guards were engaged in an activity of a character which directly affected the safety of operation of motor vehicles in interstate commerce within the meaning of the MCA even though the vehicles did not cross state lines, as the checks and other instruments transported were bound for banks outside of the state.

All of the foregoing cases dealt with the issue of what constitutes "Interstate Commerce" under the MCA and under what circumstances the character of goods shipped changed from interstate in nature to intrastate in nature. Specifically, the decisions determined the issue of "continuity of movement" as outlined in Walling v. Jacksonville Paper Co., supra, and extended or otherwise modified the three part test recognized in Baird, supra. As a result of

a review of the foregoing decisions, it is apparent that based upon relatively similar facts and circumstances, each of the Circuits have reached varying decisions based upon determinations of "continuity of movement" as it relates to "interstate commerce", including recognizing a multitude of factors.

The most significant split of authority appears to relate to the three factor test followed in Baird, supra, and the more recent decisions, including specifically, Teamsters v. ICC, supra, Central Freight Lines v. ICC, supra, and State of Texas v. U.S., supra.

A. DELIVERY OF COCA-COLA PRODUCTS

In applying the Baird test to the instant action, it is clear that the MCA Exemption of the FLSA is inapplicable to the Petitioners' claims as it relates to the delivery of Coca-Cola products from the Colorado Springs warehouse to customers located in the State of Colorado. In fact, "specific orders" of a "specific quantity"

of goods are not moved from one state through the terminal storage of a second state to a specific customer; the Respondent's separate division in Colorado Springs, Colorado is used as a "local marketing facility" from which products are "sold or allocated"; and the Petitioners' activities in distributing Coca-Cola products within the State of Colorado is arranged only after sale or allocation from storage. It should also be noted that the Opelika, supra decision supports the Petitioners' contention relative to this issue. However, the United States District Court for the District of Colorado determined that the delivery of Coca-Cola products by Petitioners was in interstate commerce thereby subjecting the Petitioners to the MCA Exemption of the FLSA. Specifically, the U.S. District Court relied upon Griffin, supra, and Galbreath, supra. Based upon the facts of this case, it cannot be disputed that the Petitioners wholly intrastate activities in delivering products were not a continuation of

the interstate journey, as defined by the Opelika and Baird Courts since there was no intent to move said goods, at the time of shipment from out-of-state, beyond the warehouse in Colorado Springs, Colorado. Further, the nature of the work performed by the Petitioners in delivering products did not relate to activities which would affect the safety of operation of transporting goods in interstate commerce.

The factors to be considered in determinging the applicability of the MCA Exemption to the FLSA recognized in Baird, have been expanded by other Circuits. The additional factors recognized by other Circuits include, but are not limited to the following:

1. The existence of storage in transit provisions;

2. Whether or not the goods are shipped pursuant to long term supply contracts;

3. Whether or not goods are stored for legitimate business purpose;

4. Whether or not specific orders by customers are to be filled;

5. Whether or not goods are processed at the temporary storage point;

6. The rapidity of movement through the terminal.

State of Texas v. U.S., 866 F.2d 1546 (5th Cir. 1989); International Broth. Of Teamsters v. ICC, 921 F.2d 904 (9th Cir. 1990); Central Freight Lines v. ICC, 899 F.2d 413 (5th Cir. 1989).

Under the additional factors, the Courts have held that all factors should be considered. In considering these factors, the Petitioners claims should not have been dismissed, as there was no evidence of a storage in transit provision, the Coca-Cola products were not shipped pursuant to long term supply contracts, the goods were stored for legitimate business purposes, specific orders by customers were not to be filled, and there was not rapid movement through the terminal. The only factor which supports a finding that the deliveries made by Petitioners were in interstate commerce for purposes of the MCA was that the product was not

processed at the Respondent's Colorado Springs, Colorado location.

Accordingly, it only logically follows that the lower court decisions in this action were, at least in part, as a result of the confusion caused by the differing decisions rendered by the various Courts of Appeal. While the appellate courts have split on this issue, and a multitude of factors have been relied upon in making a determination concerning the MCA Exemption, the district court decision rendered in this case relied upon decisions contrary to the factors identified herein. As such, the only logical conclusion is that the courts require guidance on the issue of "practical continuity of movement". The purpose and intent of the MCA in this context is to regulate the safety of operations in transporting goods which, at some point, cross state lines. The Petitioners worked solely within the boundaries of the State of Colorado and were in no way involved in the

transportation which took place between the Colorado Springs, Colorado facility and the Wichita, Kansas facility. Hence, the propensity for numerous lower courts to apply the foregoing factors to employees whose work occurs solely intrastate has led to determinations which are inconsistent and contrary to the legislative intent.

A resolution and clarification of this issue would likely limit the necessity for similar future litigation[1] and provide necessary guidance for industries involved in transporting goods. It would further effectuate the congressional purpose and intent in promoting safety of operations of goods transported across

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1 Petitioners' counsel has been advised that a similar action has been brought in the State of Oklahoma and is presently before the United States Court Of Appeals For The Tenth Circuit. Foxworthy v. Hiland Dairy Company, Case No. 92-6139.

state lines while also effectuating the congressional purpose and intent of providing a fair day's wages for a fair day's work. By way of example, Petitioners in this case were working far in excess of the hours permitted by the MCA. However, because the time spent driving was not in excess of MCA restrictions, the MCA has no mechanism to review and control the total number of hours worked. Thus, an employee can be compelled to work sixty (60) to eighty (80) hours per week, without a violation of the MCA, thereby nullifying the safety objectives of the MCA. In such instances, the better reasoned approach, which comports with safety in transporting products, is to narrowly construe the MCA Exemption to the FLSA, as legislatively intended, thereby requiring employers to pay such employees overtime in accordance with the FLSA, which will have the practical effect of discouraging employers from compelling employees to work excessive hours. Absent such a judicial

determination by this Court, numerous lower Courts will continue to render decisions which, in effect, thwart the purpose and intent of the FLSA and MCA in authorizing employers to compel employees to work, in some cases, hours greatly in excess of the MCA safety limitations, to the detriment of the public-at-large.

B. RETURN OF EMPTY CONTAINERS

In this case, the Court Of Appeals For The Tenth Circuit determined that the MCA Exemption of the FLSA applied to the Petitioners' claims on the basis of an allegation in an affidavit that empty containers were picked up from customers and ultimately returned to an out-of-state location. The affidavit failed to set forth the frequency, level of involvement or time spent by Petitioners in allegedly so doing. However, contrary to the Stewart-Jordan case, and the Opelika, case, the return of the empty containers in this case was not subject to sale or otherwise required to obtain new product, and accordingly,

the empty containers cannot be deemed to be "goods" in interstate commerce, as contemplated in the Stewart-Jordan and Opelika decisions. As such, Petitioners believe this case to be one of first impression in view of the nature of the containers, thereby necessitating review by this Court to determine not only the propriety of the decision, but to further provide guidance to the lower Courts relative to future cases involving this issue.

Not only is there a threshold question of whether or not the "empty containers" were goods for purposes of the MCA Exemption, but furthermore assuming the "empty containers" constitute goods for that purpose, which is an important issue for this Court, the practical effect of the decision by the Tenth Circuit Court Of Appeals is to circumvent the FLSA and the safety related purpose and intent of the MCA.

If the decision of the United States Court Of Appeals For The Tenth Circuit is upheld, then

Petitioners submit that it is imperative that the Supreme Court Of The United States Of America provide guidance and direction to the lower Courts to determine the factor or factors to be considered if less than the totality of the relevant facts and circumstances are relied upon to determine the applicability of the MCA Exemption.

The primary reliance upon one factor by the United States Court Of Appeals For The Tenth Circuit in making its determination (i.e., the return of empty containers) in disregard of other pertinent factors, cannot withstand scrutiny. By way of analogy, according to the United Court Of Appeals For The Tenth Circuit's logic, an employee of a retail establishment that assisted in placing such empty containers on a truck or in stocking shelves would be subject to the MCA Exemption of the FLSA, thereby precluding his or her right or entitlement to overtime compensation.

The reality of this case is that the Respondent's Colorado Springs location is a separate division which sells and delivers soft drinks wholly within the State of Colorado, whose inventory comes from both in-state and out-of-state, which inventory is commingled and is kept for weeks prior to delivery. Further, the goods are sold out of inventory and are not transferred straight through to a particular customer or specifically identified as being sold to a particular customer. The Petitioners are drivers who only deliver in-state and never cross state lines. The Petitioners would pick up empty containers and return same to the warehouse at which point they would be transported across state lines by others.

CONCLUSION

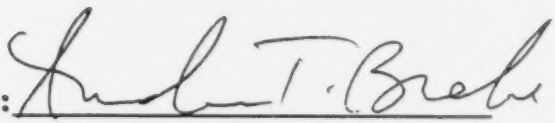
For the reasons set forth hereinabove, Petitioners submit that the lower Court decisions have had the effect of frustrating congressional intent in enacting the FLSA and MCA and

considering the divergence of Appellate decisions, there exists a necessity that the issues raised by Petitioners be addressed by this Court in order to provide the appropriate guidance to the lower courts in addressing the MCA Exemption to the FLSA.

DATED this 28th day of September, 1992.

Respectfully submitted,

ANDREW T. BRAKE, P.C.

By: 

Andrew T. Brake
Counsel of Record for
Petitioners
10200 E. Girard Ave.,
Suite No. B-233
Denver, Colorado 80231-7500
Telephone: (303) 368-7500

FILED
United States District Court
Denver, Colorado
Jul 9 1991
James M. Manspeaker, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel B. Sparr

Civil Action No. 90-S-748

MARK A. THOMAS, JOHN HAGAR, DOUGLAS GILLOTT, REYES MEDRANO, EDWARD WATKINS, ANTHONY SINTAS, JOHN STRUCKEL, ANTHONY GIRON, MICHAEL CHURCH, BUCKLEY BERKEY, WILLIAM CHURCHILL, and VICTOR BRADEE, ON THEIR BEHALF, and ON BEHALF OF ALL SIMILARLY SITUATED INDIVIDUALS WHO MAY ELECT TO PARTICIPATE IN THIS ACTION PURSUANT TO 29 U.S.C. SECTION 126(d),

Plaintiffs,

v.

THE WICHITA COCA-COLA BOTTLING COMPANY,

Defendant.

ORDER

THIS MATTER comes before the Court on Defendant's motion for summary judgment against all Plaintiffs except John Struckel. The Court has reviewed the motion, response, reply, the applicable law and is fully advised in the

premises. Defendant has moved for summary judgment against all Plaintiffs except John Struckel, arguing that the overtime provisions of the Fair Labor Standards Act (FLSA), under which Plaintiffs are seeking overtime compensation, specifically exempt Defendant from any overtime liability as Plaintiffs' claims fall under the "motor carrier exception" (Section 13(b)(1) of the FLSA). The primary question here concerns whether the motor carrier exception covers the claims of the Plaintiffs, thus rendering their claims for overtime compensation under the FLSA not actionable. In turn, the Court must determine whether (1) the Plaintiffs performed duties which were involved in interstate commerce; and (2) the Department of Transportation had the power to regulate Plaintiffs' hours.

The proper focus for the first question is on the movement of goods, and not the movement of the drivers. Morris v. McComb, 332 U.S. 422, 431-32 (1947). In the instant case, Coca-Cola

products from Kansas were delivered by drivers within the state of Colorado, and the customers' empty containers were transported daily from Colorado Springs to Wichita, while the warehouse supply of the product (picked up by delivery drivers in Colorado Springs) was turned over almost every week. The Coca-Cola product delivered by the drivers (and empties retrieved by them) was, as a result, moving in interstate commerce, regardless of the fact that the drivers' trips were confined to the area of a single state. Griffin v. Consolidated Foods Corp., 587 F.Supp. 921 (W.D.N.C. 1984) aff'd 771 F.2d 826 (4th Cir. 1985). As drivers, there is no indication that Plaintiffs ever made a delivery to a destination outside Colorado. This fact is apparent based on the affidavits submitted in the Plaintiffs' response to the Defendant's motion for summary judgment, of David Herman, Division manager of the Colorado division of the Defendant, and David Bean, former Sales Manager and Colorado Division manager for

Defendant in the Colorado Springs facility. Both of these affidavit indicate that while drivers employed at the Colorado Springs facility do not transport Coca-Cola products from Wichita, Kansas, the products are delivered primarily from that bottling source in Wichita. In Morris v. McComb, 332 U.S. 422, the Supreme Court examined the motor carrier exception to the FLSA where the interstate transportation of goods amounted to only 4% of the total transportation service provided. The court noted that the character of the activities, rather than the proportion of either the employee's time or his activities that determines the need for the [Department of Transportation's] power to establish rules.

The character of the activities here involves transportation of Coca-Cola products within the state of Colorado. Courts have also properly focused their analysis not on the duties of a particular employee, but rather on the nature of the goods involved. Griffin v. Consolidated Foods Corp., 587 F.Supp. 921, and

Galbreath v. Gulf Oil Corporation, 413 F.2d 941 (5th Cir. 1969). Based on these cases in which the transported goods were found to move in interstate commerce, it appears largely irrelevant that the persons transporting them failed to cross state lines. Galbreath, 413 F.2d at 942; Griffin, 587 F.Supp. at 924. In both cases, the nature of the movement of goods was examined in particular, with focus on the character of their interstate movement. In the present case, there is little need for discussion of the character of the movement as there exists no dispute that the origin of the Coca-Cola products which were delivered by Plaintiffs is Kansas, and that the "empties" were returned to the bottler in Kansas for refilling. The two week supply which Defendant maintains in its warehouse does not change the outcome with regard to the interstate nature of the goods.

Based on the nature of the transportation of Coca-Cola products which Plaintiffs engaged in, there can be little doubt that the motor

carrier exception of Section 13(b)(1) of the FLSA applies to the present action. [1] Accordingly, the Department of Transportation had the power to fix maximum hours and otherwise regulate Plaintiffs. Southland Gasoline Co. v. Bayley. 319 U.S. 44, 48(1943). The application of the exemption renders Plaintiffs' (except Struckel) claims for overtime wages under the Fair Labor Standards Act unactionable. Defendant's motion for summary judgment is GRANTED. As this is the controlling issue regarding Plaintiffs' (except Struckel) complaint, the COMPLAINT IS DISMISSED as to ALL PLAINTIFFS EXCEPT STRUCKEL.

1

Seven of the deposed Plaintiffs were also aware of the Department of Transportation's involvement in the performance of their jobs, as indicated by deposition excerpts in Defendant's supplemental appendix in support of its motion for summary judgment. This awareness showed a familiarity or memory of Department of Transportation safety regulations book, log book for maintenance performed on the trucks and hours worked by the drivers, as well as a driving test administered to at least some of the drivers.

This action is dismissed as to all Plaintiffs except Struckel, and the Clerk of the Court is directed to enter judgment in favor of the Defendant accordingly. The Plaintiffs' motion for providing notice to employees pursuant to Section 16 of the Fair Labor Standards Act is therefore MOOT.

DATED at Denver, Colorado, this 9th day of July, 1992.

BY THE COURT:

/s/ Daniel B. Sparr

Daniel B. Sparr

United States District Judge

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
DISTRICT OF COLORADO

James R. Manspeaker, Clerk Room C-145
United States Courthouse
1929 Stout Street
Denver, Colorado 8294
Phone: (303) 844-3433
FTS 564-3433

Case No. 90-S-748

CERTIFICATE OF MAILING

I hereby certify that a copy of the ORDER signed by Judge Daniel B. Sparr and filed on July 9, 1991, was mailed on July 10, 1991, to the following:

Andrew T. Brake, Esq.
10200 East Girard Avenue, Suite B-233
Denver, CO 80231

Gregory A. Eurich, Esq.
Holland & Hart
P. O. Box 8749
Denver, CO 80201

Elaine Turner, Esq.
Holland & Hart
Holly Sugar Building, Suite 1300
Cascade Avenue and Pikes Peak Avenue
Colorado Springs, CO 80903

Magistrate Judge Richard M. Borchers

/s/ Judy L. Poor
Secretary/Deputy Clerk

FILED
United States Court Of Appeals
Tenth Circuit
Jul 01 1992
Robert L. Hoecker
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MARK A. THOMAS, JOHN HAGAR, DOUGLAS GILLOTT, REYES MEDRANO, EDWARD WATKINS, ANTHONY SINTAS, ANTHONY, GIRON, MICHAEL CHURCH, BUCKLEY BERKEY, WILLIAM CHURCHILL, and VICTOR BRADEE, ON THEIR BEHALF, and ON BEHALF OF ALL SIMILARLY SITUATED INDIVIDUALS WHO MAY BE ELECTED TO PARTICIPATE IN THIS ACTION PURSUANT TO 29 U.S.C., SECTION 126(d),	)	
Plaintiffs-Appellants,	)	
vs.	)	Nos. 91-1274 91-1342
THE WICHITA COCA-COLA BOTTLING COMPANY,	)	
Defendant-Appellee.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. 90-S-0748)

Andrew T. Brake (Lee Thomas Judd with him on the brief), of Andrew T. Brake, P. C., Denver, Colorado, for Plaintiff-Appellants.

Elaine H. Turner, Colorado Springs (Gregory A. Eurich, Denver, Colorado, with here on the brief), of Holland & Hart, for Defendant-Appellee.

Before LOGAN, ENGEL[2] and KELLEY, Circuit Judges.

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[2] The Honorable Albert J. Engel, Senior United States Circuit Judge For the United States Court of Appeals-Sixth Circuit, sitting by designation.

KELLEY, Circuit Judge.

Pursuant to the provisions of the Fair Labor Standards Act, 29 U.S.C. Sections 201-219, Plaintiffs-Appellants (Plaintiffs) sought to recover overtime wages from their employer, Defendant-Appellee Wichita Coca-Cola Bottling (Wichita). Wichita denied any obligation to pay overtime, relying on the motor carrier exemption of the Act, Section 13(b)(1), 29 U.S.C. Section 213(b)(1). The district court granted summary judgment in favor of Wichita, holding as a matter of law that (1) Plaintiffs performed duties that were involved in interstate commerce and (2) the Department of Transportation had the power to regulate Plaintiffs' hours. Our jurisdiction to review the district court's summary judgment arises under 28 U.S.C. Section 1291 and we affirm.

Background

The Fair Labor Standards Act of 1938 (FLSA or Act) provides that any employee who "is engaged in commerce or in the production of goods for commerce" shall be paid a minimum of one and one-half times his regular rate for a work week longer than forty hours. Act, Section 207 (a)(1); 29 U.S.C. Section 207 (a)(1). The Act exempts from the overtime provision of Section 207:

> any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49; . . .

29 U.S.C. Section 213 (b)(1). Whether this exemption applies is dispositive of this appeal.

Undisputed affidavits before the district court established the following facts. Wichita is a privately-owned corporation headquartered in Wichita, Kansas, and is engaged in the business of bottling and selling Coca-Cola products. As part of its Colorado division, Wichita has a sales center in Colorado Springs. Plaintiffs

seek overtime pay in connection with their employment as route drivers and route supervisors in the sales center. Although Wichita did not pay overtime to its route drivers and route supervisors, it did pay overtime to its merchandisers and warehouse laborers. Wichita regarded these latter positions as nonexempt under the Act.

The Colorado Springs sales center obtains approximately ninety percent of its products from Wichita's bottling facility in Kansas. The sales center places product orders with the Wichita bottling facility two weeks in advance of delivery. Orders are based on anticipated orders from sales center customers. The sales center attempts to keep a two-week inventory of Coca-Cola products in its warehouse.

The Coca-Cola products normally are transported by Wichita's drivers (who are based in Kansas) from the bottling facility in Wichita to the sales center, although occasionally the products are transported by common carrier. The

products are stored in the sales center warehouse until delivered to customers by route drivers, who regularly transport the products to customers. Route supervisors also regularly transport these Coca-Cola products to customers when they fill in for route drivers. Both drivers and supervisors are required, when delivering Coca-Cola products from the Colorado Springs sales center, to pick up empty product containers held by customers. The empty containers are then returned to the sales center and transported to the Wichita, Kansas bottling facility on a daily basis.

Route drivers, and supervisors when filling in for route drivers, are required to complete Department of Transportation (DOT) logs recording the time spent from the time the delivery truck leaves the sales center warehouse until the truck returns. These DOT logs are retained in accordance with DOT regulations and are subject to DOT inspection. All route drivers and route supervisors are required to pass (DOT)

written tests and driving tests and must complete various DOT forms. They also must pass a DOT physical and drug test. Each driver is given a copy of the Federal Motor Carriers Safety Regulations Pocketbook containing applicable DOT regulations.

Discussion

Plaintiffs appeal from the grant of summary judgment. Our review is de novo and we apply the same legal standard used by the district court in evaluating the summary judgment motion, namely Fed. R. Civ. P. 56(c). Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.,. 912 F.2d 1238, 1241 (10th Cir. 1990). Summary judgment is appropriate if "there is no genuine issue to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the

case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986); Adickes v. S. H. Kress & Co., 398 U.S. 144, 157(1970); Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991).

A movant need only point to those portions of the record that demonstrate an absence of a genuine issue of material fact given the relevant substantive law. Celotex Corp. Catrett, 477 U.S. 317, 322-23 (1986). If a movant establishes its entitlement to judgment as a matter of law given uncontroverted, operative facts contained in the documentary evidence, summary judgment will lie. See Anderson, 477 U.S. at 251.

"Rule 56(e) . . . requires the nonmoving party to go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)) (emphasis supplied). Thus, when a movant claims that there is no genuine issue for trial because a material

fact is undisputed, the nonmovant must do more than refer to allegations of counsel contained in a brief to withstand summary judgment. Rather, sufficient evidence (pertinent to the material issue) must be identified by reference to an affidavit, a deposition transcript or a specific exhibit incorporated therein. Id.; Phillips v. Calhoun, 956 F.2d 949, 952-53 (10th Cir. 1992). In the absence of such specific reference, we will not search the record in an effort to determine whether there exists dormant evidence which might require submission of the case to a jury. Id. Such an appellate supplementation of the nonmovant's presentation would not be fair to either the movant or the district court.

Plaintiffs do not contest the facts as set forth above. Instead, they argue that the inferences from these facts demonstrate a material factual dispute concerning whether Wichita intended that product delivered from Kansas to Colorado would remain in interstate commerce once it reached the warehouse.

Plaintiffs suggest that, once delivered, the product remained in the warehouse and took on an intrastate character. Assuming arguendo that Wichita's intent with respect to its product deliveries does present a question of fact, absolutely no dispute exists regarding the handling of empty product containers. They are picked upon on a daily basis, returned to the Colorado Springs warehouse, loaded onto trucks and shipped to Wichita's out-of-state bottling facility.

The regular pick up of empty containers destined for out-of-state bottling facilities has been held to both place employees in interstate commerce and exempt them from the overtime provisions of the FLSA under the motor carrier exemption. Opelika Royal Crown Bottling Co. v. Goldberg, 299 F.2d 37,42-43 (5th Cir. 1962); Walling v. Silver Bros., 136 F.2d 168, 171 (1st Cir. 1943).

In Opelika, the Fifth Circuit considered a very similar situation. Defendant distributor purchased Nehi products and transported them to

its Opelika, Alabama warehouse. The products were unloaded, stacked on pallets, and, as needed, placed on five route trucks owned and used in local distribution. The driver-salesmen and helpers unloaded the products along the route, picked up empty bottles and placed them on the route truck. On return to the warehouse, the employees unloaded the empties which were then sorted, separated, loaded on a transport truck and shipped back to the bottling source. On these facts, the Fifth Circuit agreed that the employees were engaged in interstate commerce, covered by the FLSA, but nevertheless exempt from the overtime provisions under Section 13(b)(1), the motor carrier exemption. See also Baez v. Wells Fargo Armored Serv. Corp., 938 F.2d 180, 182 (11th Cir. 1992) (reaffirming Opelika), cert. denied, 112 S.Ct. 941 (1992).

In Silver Bros., the drivers, in addition to delivering beer in New Hampshire, also picked up empty beer containers which were then shipped to out-of-state breweries. Although the district

court found that the drivers were not engaged in interstate commerce, the First Circuit observed that if such activity had involved a substantial portion of the drivers' time, the drivers would be engaged in interstate commerce, but exempt from the FLSA under the motor carrier exemption.

Plaintiffs suggest that a factual issue exists concerning the actual amount of time they spent retrieving empty product containers. Aplt. Reply Brief at 5-6 (citing Aplt. App. at 58-59 & 94-95). First, the references Plaintiffs cite are to an affidavit which does not address the return of empty containers and a district court brief which contains counsel's arguments. As noted, statements of counsel are not summary judgment evidence. Second, Plaintiffs' suggestion that the time devoted to handling the empty containers is an insufficient base on which to ground the motor carrier exemption has been answered by the Supreme Court in Morris v. McComb, 332 U.S. 422 (1947). In Morris, the Court held that employees were exempt from the

overtime provisions of the FLSA even though only three to four percent of their time was devoted to services in interstate commerce. Id. at 434, 437.

For the motor carrier exemption to apply, the relevant factual issue "is not whether a substantial part of [an employee's] duties affected the safety of operations but, rather, whether any of [the employee's] duties had a substantial effect on motor vehicle safety.'" Crooker v. Sexton Motors, Inc., 469 F.2d 206, 209 (1st Cir. 1972) (quoting Yellow Transit Freight Lines, Inc. v. Balven, 320 F.2d 495, 498 (8th Cir. 1963)).

> It is the character of the activities rather than the proportion of either the employee's times or of his activities that determines the actual need for the [Secretary of Transportation's] power to establish reasonable requirements with respect to qualifications, maximum hours of service, safety of operation and equipment.

Levison v. Spector Motor Serv., 330 U.S. 649, 674-75 (1947). Both Wichita and its route drivers and supervisors intended to and did

comply with DOT regulations concerning preemployment physicals, log books, written and practical driving tests and drug testing. The district court correctly concluded, based upon the undisputed facts, that the character of the activities subjected the Plaintiffs to the power of the Secretary of Transportation, thus exempting them from the FLSA.[3] Accordingly, summary judgment in favor of Wichita is AFFIRMED.

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3 Wichita contends that it is entitled to summary judgment because the "essential character" of its Kansas to Colorado shipments is interstate, quite apart from the return of the containers from Colorado to Kansas. See, e.g., Roberts v. Levine, 921 F.2d 804 (8th Cir. 1990); International Bhd. v. ICC, 921 F.2d 904 (9th Cir. 1990). Because we uphold the district court's summary judgment on the latter ground, we need not decide this point.

28 U.S.C. Section 1343

Section 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of

any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for protection of civil rights, including the right to vote.

(b) For purposes of this section - -

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(As amended Dec. 29, 1979, Pub.L. 96-170, Section 2, 93 Stat. 1284.)

29 U.S.C. Section 207(a)(1)

Section 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. Section 213(b)(1)

(b) The provisions of section 207 of this title shall not apply with respect to --

(1) any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49; or

49 U.S.C. Section 3102

Section 3102 Requirements for qualifications, hours of service, safety, and equipment standards

(a) This section applies to transportation --

(1) described in section 10521 and 10522 of this title; and

(2) to the extent the transportation is in the United States and is between places in a foreign country, or between a place in a foreign country and a place in another foreign country.

(b) The Secretary of Transportation may prescribe requirements for --

(1) qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier; and

(2) qualifications and maximum hours of service of employees of, and

standards of equipment of, a motor private carrier, when needed to promote safety of operation.

(c) The Secretary may prescribe requirements for the comfort of passengers, qualifications and maximum hours of service of operators, and safety of operation and equipment of a motor carrier of migrant workers. The requirements only apply to a carrier transporting a migrant worker --

(1) at least 75 miles; and

(2) across the boundary of a State, territory, or possession of the United States.

(d) Before prescribing or revising any requirement under this section, the Secretary shall consider the costs and benefits of such requirement.

49 U.S.C. Section 10521

Section 10521. General Jurisdiction

(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation by motor carrier and the procurement of that transportation, except by a freight forwarder (other than a household goods freight forwarder), to the extent that passengers, property, or both, are transported by motor carrier --

(1) between a place in --

(A) a State and a place in another State;

(B) a State and another place in the same State through another State;

(C) the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States;

(D) the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or

(E) the United States and a place in a foreign country to the extent the transportation is in the United States; and

(2) in a reservation under the exclusive jurisdiction of the United States or on a public highway.

(b) This subtitle does not —

(1) except as provided in section 10922(c)(2), 10935, and 11501(e) of this title, affect the power of a State to regulate intrastate transportation provided by a motor carrier;

(2) except as provided in sections 10922(c)(2) and 11501(e), authorize the Commission to prescribe or regulate a rate

for intrastate transportation provided by a motor carrier;

(3) except as provided in section 10922(c)(2) of this title, allow a motor carrier to provide intrastate transportation on the highways of a State; or

(4) except as provided in section 11503a and section 11504(b) of this title, affect the taxation power of a State over a motor carrier.